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## Disciplining Congress: The Taxing and Spending Powers

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## **Panel One**

### **Disciplining Congress: The Taxing and Spending Powers**

**Moderator:**

*Thomas Griffith—United States Senate Legal Counsel*

**Participants:**

*Susan Low Bloch—Georgetown University Law Center*

*David Skaggs—Member, United States House of  
Representatives*

*E. Donald Elliott—Yale Law School; Paul, Hastings, Janofsky &  
Walker*

*David McIntosh—Member, United States House of  
Representatives*

*Michael Rappaport—University of San Diego School of Law*

#### **INTRODUCTION BY MR. GRIFFITH**

I welcome you to our panel discussion. Our topic is: Disciplining Congress: The Taxing and Spending Powers. Our panel will address a topic that goes to the heart of a debate over the nature of humankind: When dealing with government-sponsored redistribution of wealth, can our elected representatives, to whom the Constitution grants federal taxing and spending authority, be trusted to exercise that authority; or must we place upon them what James Madison referred to as "auxiliary precautions,"<sup>1</sup> burdens higher than those imposed by the requirement that they stand for reelection, in the case of the House, every two years, or in the case of the Senate, every six years?

The 104th Congress saw a number of proposals born of a distrust of our elected representatives and a suspicion that when the issue is redistribution of wealth, the temptation is simply too great to allow the accountability that comes from standing for reelection to provide a sufficient check or incentive to control

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<sup>1</sup>THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

their behavior. Hence, there were proposals for a constitutional amendment requiring a balanced budget,<sup>2</sup> a rule requiring supermajority approval of tax increases in the House,<sup>3</sup> and a delegation to the President of an enhanced role in the budgetary process somewhat inaccurately styled the "line-item veto."<sup>4</sup>

Our panel today will discuss these and other proposals. Are they necessary? Are they effective? Are they constitutional? Allow me to introduce our distinguished panel. Let me begin by introducing Professor Susan Low Bloch. Professor Bloch is a professor of law at Georgetown University Law Center, having joined the faculty in 1982. She teaches constitutional law and a seminar on the Supreme Court. She's the author of numerous articles in the areas of constitutional and administrative law, and is the co-author of the Westlaw publication, *Supreme Court Politics: The Institution and its Procedures*.<sup>5</sup> Before joining the Georgetown Law Center, Professor Bloch served as a law clerk for Justice Thurgood Marshall and for D.C. Circuit Judge Spotswood Robinson. She also practiced law at the Washington, D.C. law firm of Wilmer, Cutler & Pickering. Ms. Bloch received her J.D. from the University of Michigan, where she graduated summa cum laude. She was one of the seventeen well-known law professors who wrote an open letter to Speaker Gingrich challenging the constitutionality of House Rule XXI,<sup>6</sup> which provides that no bill carrying a federal income tax rate increase shall be considered as passed except by a three-fifths vote of the House.<sup>7</sup>

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<sup>2</sup> S.J. Res. 54, 104th Cong. (1996).

<sup>3</sup> S. 165, 104th Cong. (1995).

<sup>4</sup> S. 4, 104th Cong. (1996).

<sup>5</sup> SUSAN L. BLOCH & THOMAS G. KRATTENMAKER, *SUPREME COURT POLITICS: THE INSTITUTION AND ITS PROCEDURES* (1994).

<sup>6</sup> H. Res. 6, 104th Cong. § 106 (1995) (enacted as House Rule XXI(5)(c) and (d)). House Rule XXI reads in pertinent part:

No bill or joint resolution, amendment, or conference report carrying a Federal income tax rate increase shall be considered as passed or agreed to unless so determined by a vote of not less than three-fifths of the members voting.

Id.

<sup>7</sup> Bruce Ackerman et al., Comment, *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539 (1994).

To her right, Professor Michael Rappaport wrote an article responding to the open letter and defending the constitutionality of House Rule XXI.<sup>8</sup> Professor Rappaport is a professor of law at the University of San Diego School of Law, where he teaches administrative, insurance, environmental, and banking law. Prior to his appointment at the law school, Professor Rappaport was associated with the law firm of Gibson, Dunn & Crutcher, where he specialized in appellate litigation. He was also an attorney advisor at the Office of Legal Counsel in the Department of Justice, and was Special Assistant to the Assistant Attorney General in the Tax Division at Justice. A graduate of Yale Law School, Professor Rappaport clerked for the Honorable Delores Slovater in the Third Circuit.

To his right sits Representative David Skaggs. Representative Skaggs represents the Second Congressional District of Colorado. He is a graduate of Yale Law School and was a captain in the United States Marine Corps. An administrative assistant to former-Congressman Timothy Wirth, Representative Skaggs was first elected to the Colorado House of Representatives in 1980, where he served as House Minority Leader. Congressman Skaggs was elected to the 100th Congress in 1986 and has been reelected to each succeeding Congress. He is a plaintiff in *Skaggs v. Carle*,<sup>9</sup> a lawsuit challenging the constitutionality of House Rule XXI, now before the United States Court of Appeals for the D.C. Circuit.

To my right is Representative David McIntosh, who has represented Indiana's Second Congressional District since 1994. Representative McIntosh received his law degree from the University of Chicago in 1983, where he studied under then-Professor Antonin Scalia. Representative McIntosh served as special assistant to President Reagan for domestic affairs and as special assistant to Attorney General Meese in the Reagan Administration, specializing in constitutional law. In the Bush Administration, Representative McIntosh served as special assistant to Vice President Quayle, and was executive director of the President's Council on Competitiveness. Prior to that

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<sup>8</sup> John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995).

<sup>9</sup> 110 F.3d 831 (D.C. Cir. 1997) (affirming District Court ruling in favor of defendants on grounds that plaintiffs lacked standing because their alleged injury was hypothetical rather than actual).

appointment, Representative McIntosh served as the Vice President's deputy legal counsel. As we will hear, Representative McIntosh favors House Rule XXI.

Finally, Professor E. Donald Elliott is currently assistant administrator and general counsel for the United States Environmental Protection Agency. He serves as the primary legal adviser to the administrator. Since 1981, Professor Elliott has been a professor of law at the Yale Law School. He specializes in environmental law and toxic torts, torts, and constitutional law, and has authored numerous articles in professional journals. Professor Elliott is a 1974 graduate of Yale Law School. Following his graduation from law school, he served as law clerk to United States District Judge Gerhard Gesell and United States Circuit Judge David Bazelon.

We will hear first from Professor Bloch.

PROFESSOR BLOCH: Thank you. Well, I agree that Congress needs to be more disciplined. It has at times become sloppy and occasionally cavalier. It was asking for trouble when it enacted the Gun-Free School Zones Act of 1990.<sup>10</sup> The legislation said absolutely nothing about any effect on interstate commerce, and it was, therefore, not surprising to see the Supreme Court do what Senator Orrin Hatch called a wake-up call and strike the law down last spring in the *Lopez* case.<sup>11</sup> So I do think that Congress should be more responsible and more respectful of constitutional restraints.

I also believe that the budget is a serious problem. The numbers are fairly staggering, but I believe we should be wary of crafting new constitutional and quasi-constitutional limitations on the spending power. Many of the proposed constitutional amendments, such as a balanced budget amendment, are in my opinion, unwise; and many of the quasi-constitutional statutory fixes, such as the supermajority requirement for tax increases, are both unwise and unconstitutional.

Let me address the specifics of the supermajority requirement. As you just heard and as you undoubtedly know, the 104th Congress adopted as one of its internal rules of proceeding, Rule

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<sup>10</sup> 18 U.S.C. § 922(q)(1)(A) (1990).

<sup>11</sup> *United States v. Lopez*, 514 U.S. 549 (1995) (holding the Act unconstitutional as an illegitimate use of the Commerce Clause).

XXI(5); this rule provides that no bill increasing a federal income tax rate shall be considered as passed except by a three-fifths vote.<sup>12</sup> The goal is to make it harder to get tax increases passed.

I'm not sure of the wisdom of having such a rule, especially when there's no corresponding impediment to spending bills; but more importantly, I believe that the House cannot constitutionally adopt such a rule. Proponents of the rule say that under Article I, Section 5 of the Constitution, each House may determine the rules of its proceedings;<sup>13</sup> and they argue that is all that the House has done here. But the supermajority requirement contained in Rule XXI is not merely a rule of internal procedure; it is, in effect, a presentment rule. It is not like the filibuster rule which governs when things *come to a vote*.<sup>14</sup> This rule determines when things *get presented* to the other House and to the President.

Article I, Section 7 of the Constitution defines how a law is to be enacted. In particular, the so-called Presentment Clause of Section 7 provides that every bill which shall have passed the House and Senate shall, before it becomes law, be presented to the President.<sup>15</sup> So what the House has done in Rule XXI is to define the word "passed" in the Presentment Clause. Both sides of this debate agree with the presumption that "passed" means "agreed to by a majority of a quorum."

The question really is whether either House can by rule change that meaning and insist that "passed" requires something more than a majority. It is not an easy question. There are good arguments on both sides. But on balance, I am persuaded that the much better argument is that neither House can impose supermajority requirements. Allowing the House to adopt such a requirement unconstitutionally intrudes on the powers of the Senate and the President, and let me explain why.

I agree there is nothing in the text that explicitly denies the House the power to require a supermajority, but that is true of many constitutional limits we infer by looking at the structure of

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<sup>12</sup> See *supra* note 6.

<sup>13</sup> U.S. CONST. art. I, § 5, cl. 2 states, in relevant part: "Each House may determine the Rules of its Proceedings . . . ."

<sup>14</sup> The filibuster is a consequence of the Senate's cloture rule. S. Doc. No. 104-1, at 22 (1995).

<sup>15</sup> U.S. CONST. art. I, § 7, cl. 2.

the Constitution. *Chadha*,<sup>16</sup> in which the Supreme Court struck down the legislative veto, is a good example. The constitutional text does not explicitly say that Congress cannot use a legislative veto. Nonetheless, the Supreme Court inferred such a prohibition from the structure of the Constitution. Similarly, in *Nixon v. Fitzgerald*,<sup>17</sup> nothing in the Constitution says that the President has immunity from civil damage actions for official acts. Yet there also, the Supreme Court inferred such a limitation from the text and structure of the Constitution.

So the question we face is: Even though the Constitution does not explicitly prohibit either House from requiring a supermajority to pass a bill, is such a requirement consistent with the purposes of Article I and the principles of separation of powers? I believe it is not.

Article I, Section 7, the provision that defines how a law is enacted, is a carefully crafted mechanism in which the Framers struck a balance between large and small states, between state and federal governments, between the House and the Senate, and between Congress and the President. By adopting this three-fifths rule, the House unconstitutionally upsets this carefully constructed balance.

When the Framers wanted to require a supermajority, they knew how to do so. In fact, they did so in several contexts, requiring two-thirds votes to override a presidential veto,<sup>18</sup> to ratify a treaty,<sup>19</sup> to convict and impeach an official,<sup>20</sup> to propose amendments to the Constitution,<sup>21</sup> and to expel a Member from Congress.<sup>22</sup> Proponents of the supermajority rule argue that the Framers may have meant this list to be simply the minimal list of occasions that require supermajorities and that they intended to let Congress add to the list; and that is, on its face, a plausible reading. But when one considers what the impact on the other

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<sup>16</sup> *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>17</sup> 457 U.S. 731 (1982).

<sup>18</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>19</sup> U.S. CONST. art. II, § 2, cl. 2 (providing that two-thirds of the Senators present must concur in the making of treaties by the President).

<sup>20</sup> U.S. CONST. art. I, § 3, cl. 6 (providing that in impeachment proceedings, two-thirds of all Senators present must concur in the conviction).

<sup>21</sup> U.S. CONST. art. V.

<sup>22</sup> U.S. CONST. art. I, § 5, cl. 2.

branches is, I conclude that when the Framers did not specify a supermajority, they not only presumed that a majority would be sufficient, they, in fact, intended not to allow either chamber to increase the number of votes required.

Now, consider the potential impact of such a supermajority rule. Under the view of supporters of supermajority rules, there is no limit on the supermajority requirement. Thus, the House could require a ninety percent or one-hundred percent majority for selected topics, or even for all legislation. If the House adopts such a ninety or one-hundred percent rule, then even if most Representatives and a majority of Senators want a particular bill, it could not get presented to the President and could never become law. If the House can do this, it has the power unilaterally to enhance its power vis-à-vis the Senate and the President. Instead of being just one of three relatively equal players, the House, by this rule, makes itself a super-player.

Furthermore, if the House can adopt such a rule so can the Senate. Article I, Section 5 provides that each House may determine the rules of its proceedings and does not distinguish between the House and the Senate. Thus, the Senate could say that the power to confirm judges and cabinet officials, once nominated by the President, will henceforth require a two-thirds vote of the Senate to get confirmed. If the Senate were allowed to adopt such a rule, it would be able, single-handedly, to limit the power the Constitution gives to the President in the appointment process.

Finally, defenders of the supermajority rule say it is not too restrictive because a simple majority can repeal it. But I see nothing in their logic that would stop the House or the Senate from saying that repeal of the supermajority rule will itself require a supermajority.

Some supporters, including, I think, Professor Rappaport, argue that the House cannot do that: that it cannot require a supermajority to repeal a supermajority rule. They argue that legislative standing rules are valid only if the rules are themselves subject to repeal by a majority vote; and they read this restriction into the Section 5 Rules of Proceeding Clause.<sup>23</sup> Now, whether or not this is a correct reading of Section 5, I am not sure; but the

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<sup>23</sup> See *supra* note 13.



perceived need to read such a simple majority requirement into the Section supports my position. When a House, by its rules, goes beyond mere internal housekeeping and affects the relationship among the other institutional players, it distorts the finely wrought legislative process—carefully crafted by the Framers—and is, therefore, unconstitutional.

The topic for today is Congress and the need for self-discipline, and as I indicated, I agree that Congress needs self-discipline. The discipline should not come from gimmicky rules, but from careful deliberation and concern for the future. I am not categorically opposed to so-called structural statutes or to Congress' efforts to bind itself to the mast as it did in the Gramm-Rudman Act.<sup>24</sup> Indeed, some of Congress' past structural efforts, such as the Budget and Impoundment Control Act,<sup>25</sup> have usefully resolved some conflicts between the President and Congress.

I simply urge caution, so we avoid quick fixes that undermine our constitutional system or evade the underlying problem. True self-discipline comes not by turning to quick-fix diet pills, but by pushing back from the table.

PROFESSOR RAPPAPORT: Although Professor Bloch spoke about the House rule, I'm going to focus my remarks now on constitutional amendments; but I would be happy to talk about the House rule in question.

Today, I would like to defend the use of supermajority rules as a means of limiting fiscal powers of the federal government. Now, in making this argument, I want to say that I'm relying on some research that John McGinnis and I worked on together, and on which we are planning on publishing an article.<sup>26</sup> So he gets part of the blame for this.

I want to argue that the Constitution should be amended to permit Congress to pass various types of fiscal legislation only with a supermajority of each House. The supermajority might be two-thirds or three-fifths. Various supermajority rules might be employed. You could have supermajorities required to borrow

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<sup>24</sup> Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified as amended in scattered sections of 2 U.S.C.).

<sup>25</sup> Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 U.S.C.).

<sup>26</sup> John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution* (forthcoming).

money, to raise taxes, or to spend money. I do not want to advocate today any particular supermajority rule. Rather, what I want to do is explain why supermajority rules would help solve some of our problems in the political process. And I'll also want to defend supermajority rules against two objections: first, that they would assign inappropriate powers to the judiciary; and secondly, that they're inconsistent with the democratic nature of our Constitution. I will argue that supermajority rules could be designed that are compatible with a limited judiciary, and that they are entirely consistent with the republican nature of our Constitution.

Now, the main reason to adopt supermajority rules is that there are significant defects in the political process, and supermajority rules have the potential to remedy these defects. In particular, there are strong reasons to believe that the political process results in excessive debt, excessive spending, and excessive taxation. Indeed, it's not surprising that since World War II, we've had a tremendous growth in social spending, as a percentage of GNP, and we've also had a tremendous growth in debt. The reason for the excessive debt is obvious. Deficit financing is a way of forcing future generations to pay for existing expenditures.

The reason for excessive spending and excessive taxes is largely the power of special interests. Certain interests are able to exert disproportionate influence in the political process. These interests then secure additional spending, and this excessive spending must eventually be financed with excessive taxes or excessive debt. Supermajority rules would make it more difficult to pass additional borrowing, spending, or taxes. Under a supermajority rule for debt, it will be more difficult for the existing generation to borrow money. Under a supermajority rule for taxes or spending, it will be more difficult for special interests to secure the spending or financing for their programs.

It's sometimes argued that supermajority rules are not needed because Congress has the power to solve these problems on its own, but this argument, I think, is mistaken. After all, Congress also has the power not to abridge freedom of speech; but no one argues that we don't need the First Amendment. The problem is that Congress is not designed to really protect the freedom of speech.

Similarly, the structure of the political process suggests that Congress will not be able to restrain the excessive spending and excessive debt on their own. After all, in the last generation, Congress has passed legislation every couple of years that it designed to solve these problems. First, we got the Congressional Budget Act.<sup>27</sup> Then we got Gramm-Rudman.<sup>28</sup> Then we got the Budget Enforcement Act.<sup>29</sup> Each time, Congress promises to solve a problem, but it never seems to; and the reason, I think, in the end is somewhat simple. Excessive debt and excessive spending are supported by powerful political interests. If Congress really attempted to restrain such excess, many of the Members would end up losing their jobs, or that's the fear. Thus, we really need some kind of change in the structure of our government, something like supermajority rules.

While supermajority rules might remedy the defects in the political process, it's often argued that they're dangerous because they rely on the courts. This objection takes two forms. First, it's argued that supermajority rules require the courts to enforce them, but the courts cannot really be trusted to enforce the written Constitution. After all, if the courts had simply enforced the Commerce Clause, we now wouldn't necessarily have such a big problem with the federal fiscal legislation.

The second argument is that supermajority rules would provide the courts with new powers that are inappropriate for the judiciary. For example, it's argued that the balanced budget amendment would require the courts to make spending and taxing decisions.<sup>30</sup>

I believe supermajority rules can be designed that would avoid these problems. Indeed, if they're designed properly, the courts might even function better in this area than they do in the traditional areas of the Constitution.

The key to designing supermajority rules is to keep the role of the courts as simple as possible. Consider the so-called balanced budget amendment. The amendment should not require that the

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<sup>27</sup> See *supra* note 25.

<sup>28</sup> See *supra* note 24.

<sup>29</sup> Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388-573 (1990) (codified as amended in scattered sections and titles of U.S.C.).

<sup>30</sup> See, e.g., Donald B. Tobin, *The Balanced Budget Amendment: Will Judges Become Accountants? A Look at State Experience*, 12 J. L. & POL. 153 (1996).

courts ensure there is a balanced budget every year. Rather, the amendment should be designed with the more limited aim of ensuring that a supermajority authorizes the issuance of debt. Under this type of amendment, the main test for the courts would be the limited one of defining what is debt. The court's role here would be much more limited, or limited in at least several respects more than it is under traditional constitutional constraints such as the First Amendment.

Under the First Amendment, the courts make virtually all of the decisions as to whether speech can be restrained. The Court, first of all, decides whether an action constitutes speech, such as campaign contributions or flag burning. Then the Court says the reasons why you can restrain speech, and also decides whether, in that particular case, those reasons justify the restraint. By contrast, under a supermajority rule for debt, the courts simply decide whether the government has issued the debt. They don't decide, first of all, what are the legitimate reasons for issuing the debt; and they don't decide whether those reasons justify the issuance of debt at this particular time. Rather, it's Congress that decides these issues.

The reduced role of the judiciary under supermajority rules has two important advantages. First, the courts have less discretion, and, therefore, there's less chance that they will abuse their authority. Secondly, they will have less incentive, if you will, to gut supermajority rules.

In the past, courts have sometimes not enforced constitutional restrictions when those restrictions would conflict with a powerful political consensus. In these situations, the conventional wisdom is that the courts have feared that they will reduce their political capital if they make a controversial decision. That seems to be the explanation for why the courts relaxed the enforcement of the Commerce Clause during the New Deal. Under supermajority rules, the courts will never have to tell a truly powerful political consensus they cannot do what they want, and the reason for that is simple: If there is such a consensus, they will be able to obtain a supermajority in Congress. For example, the Commerce Clause might have lasted longer if, instead of prohibiting regulations of interstate commerce, it had permitted regulations of interstate commerce with a supermajority. Congress could have passed the regulations

during the New Deal, and the courts would not have had to relax the provision. In this way, supermajority rules permit the Constitution to bend, so that it does not break.

Another argument has been that judicial remedies for a violation of supermajority rules would require the courts to exercise discretion over budgetary decisions.<sup>31</sup> Again, the role of the courts here will depend on how the amendment is designed. Many versions of the balanced budget amendment don't define remedies, and they therefore created the risk that the courts may get involved. But a balanced budget amendment could be designed to avoid this risk. For example, the amendment could specify that unless Congress provides otherwise, the remedy should be a proportional sequester of outlays implemented by the President. In other words, the President would reduce spending an equivalent amount in each part of the budget. This has two advantages. First, it avoids judicial discretion. Secondly, it gives Congress an incentive not to violate the amendment because Congress doesn't want to give the President, who is its institutional rival, this type of power.

Let me now just very briefly consider the other criticism made of supermajority rules: that they're inconsistent with the democratic nature of our Constitution. Here, the argument is that, essentially, our Constitution is based on majority rule, and supermajority rules conflict with this principle. Let me say that, first of all, the Framers didn't establish a simple democracy, but instead, a republic—a system that relies on elections, but departs from simple majority rule when to do so would improve the system. Certainly, that is the case for the Bill of Rights. But it is also true with respect to things like bicameralism and the presidential veto. It is well known that bicameralism functions like a supermajority requirement. To secure a majority in two different houses, which are elected by two different groups of voters, requires more support than securing a majority in one house. Thus it is simply false to describe the Constitution as adopting simple majority rule. The Framers actually made supermajority rule a hidden, but essential part of our

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<sup>31</sup> See Tobin *supra* note 30, at 154.

Constitution.<sup>32</sup> The supermajority rules I'm advocating are consistent with this republican interpretation.

It's time to conclude. To reiterate, I think supermajority rules would be an important improvement to our Constitution. They are likely to restrain the excessive debt, spending, and taxes that have come to afflict us; and I think they can be made to be consistent with both a limited judiciary and the republican nature of our Constitution.

REPRESENTATIVE SKAGGS: Good afternoon. I want to establish, first of all, the nature of the audience. Would everyone who is an attorney please raise your hand? Pause. I was afraid of that. But given that at least we have a plurality from among the Bar, and since I am substituting for Lloyd Cutler this afternoon, I thought I could trot out that old saw from law school. Lloyd happens to be my lawyer in the three-fifths litigation that is pending,<sup>33</sup> and we all remember what we learned in law school, that the client who has himself for a lawyer has a fool for a client. I am just wondering what the variation of that is on the lawyer that allows his client to substitute for him, but you can all draw your own inferences from that.

I also wanted to begin, in appropriate "CNN" fashion, with some 'factoids' to keep in mind as we deliberate on this afternoon's subject.

Two-fifths of the United States Senate, the remainder if you require three-fifths to act, represent less than twelve percent of the people of this country, if you select your Senators carefully.<sup>34</sup> One-third of the Senate may represent as little as eight percent of the people of the country, the remainder if you require two-thirds to get something done.

Another factoid is that, notwithstanding our undisciplined current state of affairs, we are in the fourth straight year of significant reduction in the federal deficit. This is the result of many factors, but among them is the passage of the 1993 budget package by one vote in the House and one vote in the Senate.

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<sup>32</sup> See JAMES BUCHANON & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 233-49 (1962).

<sup>33</sup> *Skaggs v. Carle*, 110 F.3d 831 (1997).

<sup>34</sup> See Lynn Baker & Samuel Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21, 29 n.27 (1997) (stating that due to minimum quorums, senators representing as few as 4.4% of the population can block legislation).

This package included some tax provisions that have made a significant contribution to deficit reduction, presumably one of our objectives in having this topic before us this afternoon.

I am proud to be a Member of the United States Congress. It is a challenging environment in which to inflict self-discipline, as I'm sure my colleague, David McIntosh, will elaborate upon as well. That problem has given rise to many bad jokes, among them being the question, what is the difference between a Cub Scout pack and the House of Representatives? The answer is, the Cub Scouts have adult supervision. I really don't believe that, but it does capture the essence of what we're trying to get at this afternoon, which is: How do we get more adult supervision in Congress? How do we create an environment in which we will be more mature about our responsibilities, especially when it comes to the matter of fiscal discipline?

The seductive allure is that we will somehow find that "adulthood" by imposing more rules on ourselves, whether internally through changes in the Rules of the House, statutorily through things like the line-item veto provision, or constitutionally through something like the balanced budget amendment. What I would like to suggest is that, in addition to examining these notions as a matter of jurisprudence or constitutional law or theory, we also entertain the concept of 'legisprudence,' if you will—what do we want from our legislature? Given that it is a powerful and important surrogate for much less pleasant ways of resolving disputes in society, when do we want the pent-up frustrations, even of a large majority—conceivably eighty-seven percent of our people—to be frustrated by a supermajority requirement? Is that prudent as a way for this society to organize itself?

My experience has been—and I've only been at this for ten years—that by continuing to pretend that the answer is in the rules, we fail to recognize that the answer is in ourselves. By thinking that we can create a structure in which mere compliance is the answer to this problem, not only do we avoid coming to terms with the need for mature judgment and discretion—more 'adult' behavior, if you will—but we unwittingly let loose even more destructive powers within our experiment in self-government and our "legisprudence."

What do I mean by that, and how can I prove the case? Well, I think that it is in the nature of this beast that the more we adopt rules, the more we think that virtue is defined by compliance with rules and the more incentives we unwittingly create to figure out how not to comply. What are the ways around the rules? What acts of deviousness can undermine, while still having the virtue—purported virtue—of compliance and nonetheless give vent to the pressures that have to be resolved through the national legislature? We need to look no farther than what's happened with the three-fifths rule adopted as an internal disciplining measure for the United States House of Representatives<sup>35</sup> and the fact that every time a bill has come to the floor over the last two years that has required or seems to require addressing the need for a supermajority, the majority has preceded legislation with a rule waiving the three-fifths rule. In other words, they are unable to comply with their own purported act of self-discipline.

It seems to me that noncompliance, which eventually shifts into a certain intellectual deviousness, merely aggravates the public's concerns and cynicism, leading to further mistrust of our ability to behave as adults and, ironically, gives rise to even more pressure to adopt more rules, which we will then try to figure out ways not to comply with.

So I suggest that we would be much better off as a civic society looking for ways to make sure that we elect people of judgment and maturity to these jobs rather than figuring out how we adopt different rules for the Cub Scout pack.

This is demonstrated not only in our experience with the three-fifths rule, but even with the non-rule that everyone embraced over the last two years of getting to the balanced budget in seven years, in which both the President's proposal and the Republican majority proposal, while appearing to comply—while having the virtue of nominal compliance—were, in fact, deviant proposals. They either finessed the really hard decisions of how we were going to get to "balance" in the year 2002, as both proposals did, or they resorted to the even more cynicism-inducing artifice, as the majority budget did, of contriving a change in the determination of the basis for assets in calculating capital gains, so as to produce an artificial bump-up in capital

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<sup>35</sup> H. Res. 6, 104th Cong. (1995) (adopted as House Rule XXI(5)(c) and (d)).



gains receipts in the year 2002—a one-year-only event, after which the budget would implode again into deficit. These approaches may achieve a veneer of compliance by 2002, but do not exhibit a real systemic addressing of the problem.

We are seeing the same thing now with the effort that we said we made last year to deal with the line-item veto. There was a piece in *The Washington Times* the other day that says now that President Clinton has been reelected, a lot of advocates of that legislation are having second thoughts.<sup>36</sup> But, those of you who are lawyers think about the absurdity of one of the sections in this line item veto proposal which gives the President five days after signing a bill to go back in and cross out provisions. It's sort of like 'springing executory interests' in the law of trusts and estates.<sup>37</sup> This is a springing executory retroactive veto.

Now, give me a break. Again, we have kidded ourselves that by having passed a new rule, we have somehow gotten to the substance of the matter. In fact, all of these things, I submit to you, are a way of avoiding the issue. The issue is entitlements. That is the part of the budget that is growing. That is where the real risk to fiscal sanity and long-term stability for the country is. The more we delude ourselves into thinking that, by passing a three-fifths rule or a line-item veto or any of these other gimmicks, we've really solved the problem, the more we spend our energy on the wrong problem, and the less well we serve you and the rest of the country.

REPRESENTATIVE McINTOSH: Thank you. I wanted to talk with you about three forms of changes that I think should be made that would allow us to comply with the majority wishes of reducing the size of government and shrinking its influence in this country. Along the way, I'll talk about the relative merits of different ways of approaching this issue: the balanced budget amendment, the supermajority limitation on tax increases, and some type of limit, probably best statutory, on the ability of agencies to pass new regulations.

What I encountered talking with people over the last three years is that there are two sentiments that the public has that are

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<sup>36</sup> Brian Bloomquist, *Line-item Veto Backers Now Skeptical, Worry About Use by Clinton, May Test its Constitutionality*, WASH. TIMES, Nov. 13, 1996, at A10.

<sup>37</sup> JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 755 (5th ed. 1995).

in tension with each other. First, when you go and talk with people at a factory who are working for a living and you ask them if there is any message that they want their Congressman to take back to Washington, the number one message is, "Cut our taxes; the government is taking too much out of our wallet; it's difficult to make ends meet; my wife and I are both working, and it doesn't seem like we're getting ahead." Variants on that comment come up over and over and over again.

The second sentiment is that they don't trust politicians to actually do that, and I think we saw that in this last election, where Senator Dole had a very strong proposal for reducing the tax burden geared towards middle-class, working families. People indicated that they didn't believe that he would actually do it, if elected. That sentiment carried over, I think, to other politicians because of doubts that they would follow through on election year promises to reduce taxes and reduce the size of government.

Why is this? I think the reason is that we're seeing a public reaction to what has been, essentially, a Democratic majority for the last forty years. In the Congress, the Democrats were in control. In the Executive for many of the recent years, Republicans were in control. But you had a bipartisan consensus that at election time, it was good to talk about reducing taxes and reducing the size of government, but afterwards we had to govern, and that meant that we had to go back and figure out how not to reduce, and, in many cases, how to increase taxes and increase the regulatory burden. I don't want to say in a strictly partisan way that it was simply my colleagues on the other side of the aisle. I served with President Bush, and Dick Darman was an effective advocate for increasing taxes. That is what I think of as an anti-democratic majority because they were ignoring the sentiment that the public wants less government at this point in our history.

What can be done to change that sort of "mis-representation" by the elected officials and elected bodies here in Washington, so that we have a more democratic approach toward fulfilling what I believe is a core value that the American people have at this point of less—although still effective and efficient—government, lower taxes, and less of a burden on their private lives?

Professor Bloch addressed the question of the rule change that we made in the previous Congress, and I have to say I agree with my colleague David Skaggs' criticism that we ended up waiving

that three-fifths rule in each of the times when it might have been applicable. And that, in fact, probably adds to the cynicism of whether elected officials will follow through on their promises in this area. By the way, I think probably the fact that it can be waived by a majority takes away any of the constitutional problems or at least effectively makes it something that is not a burden on our constitutional structure because a simple majority still the status quo.

Therefore, I think we need to seriously consider constitutional changes, and a balanced budget and a tax limitation amendment are two that I strongly favor. Originally, two years ago, they were combined. We didn't have the votes to pass a balanced budget with a tax limitation proposal; so we split them out. And thanks to John Shadegg, a colleague of mine in the freshman class, we have a commitment from our leadership to bring the tax limitation amendment back up very early this coming year in the legislative calendar.<sup>38</sup> I also think that there's a good chance that we will see a balanced budget amendment approved by both houses of Congress and sent to the States. I think the chief value of this is not to create additional litigation or new rights that can be enforced in court. I think the chief value of a balanced budget amendment is to change the job description of our elected officials. One of the things that motivates me and my colleagues more than anything else is a high percentage of floor votes on legislation. David Skaggs and I both worry about making sure we don't miss votes because, in the election process, if we only show up three-fifths of the time, the voters will be told about this by our opponents, who will say, "What's he doing? He's off playing golf. He's not doing what we sent him there to do." It doesn't matter on the substance, but the fact that we missed the votes means that we're not living up to our job description, that we're supposed to be there voting on legislation, one way or the other.

If we have a constitutional amendment that says Congress must balance the budget and present that to the President, I think that then changes a congressman's job description. And the debate in the election process is whether he has succeeded in achieving what we sent him there to do. One of the jobs is to vote on bills.

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<sup>38</sup> H.R.J. Res. 62, 105th Cong. (1997). See also 143 CONG. REC. H1506 (daily ed. April 15, 1997) (noting that the resolution failed by a vote of 233 to 190).

One of them is to balance the budget for the country. That political pressure is what will, in effect, lead to a balanced budget much more than any legal requirement that may come out of this.

The tax limitation rule I favor for a different reason, which is that if you have a goal of balancing the budget, you can do it in several different ways. One of them is to increase revenues and not decrease spending. That leads to a continued increase in government. Tax limitation makes it harder to do that and, therefore, changes the incentives in the elected bodies, giving us a greater incentive for spending reductions as a way of reaching that balanced budget goal.

I think also that we need to look at the cost of hidden taxes—and that would be regulations—in considering this question of whether we need structural changes to reduce the burden of government on the public. If you look at regulations, they now amount to about \$500 to \$600 billion in costs per year to society—depending on whose estimates you use—somewhere from one-third to one-half the level of the tax burden on society, with significant changes in our economic behavior as a result.<sup>39</sup>

Frankly, we also have a system that is no longer living up to its purposes in many of the social functions for regulations. I don't think we do a good job of using regulations to clean the environment, to provide for worker safety, to have a healthier America. When you've got a system where one-half of the funds under Superfund<sup>40</sup> are spent for lawyers and consultants rather than actually cleaning up the environment, and when you've got OSHA<sup>41</sup> regulations where the number-one fine is for paperwork violations rather than real safety concerns, and where the FDA takes twice as long as other countries to approve new drugs in our regulatory process,<sup>42</sup> we fail to meet the social goals of having a cleaner environment, a safer workplace, and a healthier America.

Break in tape.

... as part of the debt ceiling, we actually changed that formula somewhat by creating a process where a "superminority"—what I

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<sup>39</sup> Patrick Buchanan, *Common Sense Reform: A Legislator's Viewpoint*, 31 WAKE FOREST L. REV. 799, 802 (1996).

<sup>40</sup> Hazardous Substances Superfund, 26 U.S.C. § 9507 (1994).

<sup>41</sup> 29 U.S.C. §§ 651 - 659 (1994).

<sup>42</sup> See John Patrick Dillman, *Prescription Drug Approval and Terminal Diseases: Desperate Times Require Desperate Measures*, 44 VAND. L. REV. 925, 936 (1991).

would call the opposite of a supermajority—would be able to force Congress to address these regulations and bring them back for a vote in the House and in the Senate.

The problem there is we're not organized to do that, and as a result, the agencies, which are very efficient at what they're doing, have figured out how to play games and avoid this new requirement. We in Congress are behind the eight ball, if you will, for failing to really find a structure and a process to bring those back for a democratic review and a vote in the legislature.

I've got a proposal to do something, again analogous to what the states have done, in the balanced-budget area. The states set up joint committees to review these regulations through procedures that have political consequences, and it works very effectively in states like Ohio and Illinois.

Let me conclude by saying I think these rules will have consequences for the policy choices that are made by our elected officials, but chiefly what they will do is enable us to return to a more democratic approach in our elected officials' actions. One of the reasons they're opposed by anti-democratic "forces" in our country—I think they no longer form a majority—is that they fear that many of the changes that were brought about in the last forty years would be changed as a result of these new rules.

I think supermajority rules would allow the public to have greater influence on the process and, therefore, I strongly support them and encourage these changes as rapidly as possible in the political climate.

I think it's important, though, as we do that to remember that we have to follow the rules in implementing them, which then solves our anti-democratic criticism, because the rules require supermajorities to change the Constitution.<sup>43</sup> But if we can pass that obstacle, I think the results will greatly benefit us in reaching back towards a more democratic goal of lesser government, of lower taxes, and of less intrusion into people's lives—all of which the public very clearly, as I have learned in talking to them over the last three years, wants us to do, but is skeptical about the political process in achieving those goals.

Thank you very much.

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<sup>43</sup> U.S. CONST. art. V.

PROFESSOR ELLIOTT: Those of you who remember Thomas Griffith's introduction of me may be wondering what the current General Counsel of EPA is doing on this panel, and the answer is he's got an old resume. I served as General Counsel of EPA in the Bush administration. I was proud to serve as the right wing of the left wing in the Bush administration, and I've been a professor at Yale Law School since 1981. I'm currently also a partner in the law firm of Paul, Hastings, Janofsky & Walker in Washington, D.C.

I've both written about separation of powers issues and constitutional law and also about environmental law and environmental protection issues. What I want to talk about today is congressional overspending as an example of environmental pollution, and the lessons of environmental regulation as applied to the problem of designing a system to regulate congressional overspending.

The comments by my good friend, Sue Bloch, and by Congressman Skaggs have really set up the issue of why we need regulation in this area. I won't call either of them a "liberal," particularly in front of this audience, but I think it's extraordinary that, among liberals, the one area where we don't need regulation and where we ought to just let morality and self-restraint solve the problem is in the spending area.

I want to argue that the same kinds of arguments that we're so familiar with as justifications for other legal regulations, like environmental regulation, are equally applicable here to the problem of congressional overspending. And secondly, I want to argue that some of the kinds of lessons that we've learned about how to do regulation better should be brought to bear on the question of how we regulate Congress, because that's really what this is about, how we regulate Congress.

Now, that's an area where conservatives are at a little bit of a disadvantage, because most conservatives spend their time arguing against further regulation, not how to create regulation to do it better. Through a series of coincidences, I've found myself spending a lot of my life thinking about what we know about regulation, what works and what doesn't.

I'm in a position of supporting most of the measures that we've talked about. I support the concept of supermajority requirements, but unfortunately, I'm persuaded that they are

unconstitutional when created by statute or rule. I support the balanced budget amendment, but I agree with David that there are some real problems in making it work.

What I'm thinking about is what the future of regulation in this field ought to look like. Well, let me make the argument about why controlling Congressional spending is really isomorphic to, or similar in structural form to the classic arguments for the need for regulation.

As in the environmental area, what we have here is a very decentralized system with lots of decision makers—in this instance, political actors or members of Congress. And those people are able to appropriate a large portion of the gain from taking a particular action—namely, reelection—by promising benefits either to the special interests or to the voters. By doing so, they externalize a large portion of the costs onto others, including future generations—an issue very well-known in the environmental area—others outside the district, and unorganized groups who are not paying attention to hidden taxes.<sup>44</sup>

This is the classic structure of a problem that, in every other instance, cries out for regulation in the mind of the liberal. It's a "Tragedy of the Commons" problem; it's a "Prisoner's Dilemma" problem; it's a "public-goods" problem.<sup>45</sup> It's a situation where we'd all be better off if we could simply restrain ourselves, but we can't.

Now, morality is certainly relevant, just like morality is relevant in the environmental area. There are altruists. There are people who will restrain their own tendency to pollute. There are people like David McIntosh, who are in favor of fiscal restraint.<sup>46</sup> But what we know about human nature—and I think St. Thomas Aquinas really went to the core of the issue when he said that law is really about defects in human nature.<sup>47</sup> While there are good

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<sup>44</sup> For an elaboration, see E. Donald Elliott, *Constitutional Conventions and the Deficit*, 1985 DUKE L.J. 1, and authorities cited therein, especially Petersen.

<sup>45</sup> See Baker & Dinkin, *supra* note 34, at 33 n.34 (1997) (noting that the "race to the bottom" and the "tragedy of the commons" are both variants of the Prisoner's Dilemma).

<sup>46</sup> See David McIntosh, *The Federalist Society Conference: Civil Justice and the Litigation Process: Do the Merits and the Search for Truth Matter Anymore? Day One*, 41 N.Y.L. SCH. L. REV. 513, 515 & n.a (1997).

<sup>47</sup> JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 35-36 (1980).

aspects in human beings, as Madison said, if men were angels, we wouldn't need government.<sup>48</sup> Yes, there is altruism. Yes, there is some ability to "push away from the table" (as Professor Bloch and Representative Skaggs termed Congressional self-restraint in their oral remarks). Yes, there's fiscal restraint. But there's not enough of it, and in some instances, we need legal regulation in addition to altruism and morality.<sup>49</sup>

The arguments in favor of legal regulation here are perfectly analogous to the classic arguments for regulation in other areas.

Now, one of the things that we know about the need for regulation is that the best way to regulate, as in the environmental area, would be to come up with incentives and a better specification of property rights. I haven't figured out how to do that in this area, but I want to acknowledge that that would be the first best approach. Essentially, what we're talking about today is the use of various forms of command-and-control regulation, analogous to those we have used in the environmental area, to deal with an analogous problem of congressional spending.

I just want to note in passing that this is not a unique analysis. The regulatory reform bill in the last Congress<sup>50</sup> essentially utilized all of the same techniques used by our environmental laws as a kind of meta-system to regulate the regulators<sup>51</sup>—the same mechanisms of petitioning and requiring environmental impact statements. So we need to use similar techniques to regulate Congressional over-spending.

Let me make four points which I think are lessons from what we learned in environmental law about how to regulate better. The first is that you've got to *make the problem visible*. We've tried in many areas to regulate without having made the problem visible, without really having the goods, and every time you do that, you fail. So, I'm in favor of measures which make it clear to the public exactly how much of their money we're spending. There was a

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<sup>48</sup> THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

<sup>49</sup> For an elaboration of the argument that legal regulation compensates for insufficient altruism in large communities, see E. Donald Elliott, *Law and Biology: The new Synthesis*, 41 ST. LOUIS L. REV. 595, 607-610 (1997) (Childress Lecture).

<sup>50</sup> Regulatory Transition Act of 1995, H.R. 450, 104th Cong.

<sup>51</sup> See generally Symposium, Regulating Regulation, 57 LAW & CONTEMP. PROBS. (1994) (Jim Hamilton, ed.).



recent article by Walter Williams in *The Washington Times*, who advocates that we disclose to the public the hidden costs of government taxes in everything that we buy.<sup>52</sup> For the same reason that I believe that disclosure is a valuable tool in the environmental area, I think the first step to building a strong popular consensus to support the kinds of regulatory measures that are necessary is enhanced disclosure in this area.

I also agree with David that the real issue here is not just the deficit. That's one of the issues. But the real issue, in the long term, is the total amount of goods that are allocated by the public sector as opposed to the private sector. The deficit is an accounting concept. It's an important accounting concept because of the future generations issue. But the real question—and it was the fundamental question in the last election and will be in elections for years to come—is what percentage of total national wealth is going to be allocated privately as opposed to by the public sector?

The second point that I want to make, again, a lesson from regulation in the environmental area, is that we should *measure progress in terms of changes in behavior* rather than in terms of juridical acts, rather than in terms of particular legal actions implemented. The example in the environmental area is we always measured environmental progress in terms of numbers of enforcement cases brought. We've learned that we need better indicators of actual performance—how things actually change.

That's one of the reasons I support a capital budget. One of the first things that we've got to do is we've got to have an honest game; we have to have a very good way of tracking what we're actually doing and get past some of these accounting tricks. The third point I would make—again, a lesson from theories of regulation, one of those black arts that conservatives don't read that much, but one of the things that we've learned in theories of regulation. Generally, we regulate more effectively through *affecting behavioral incentives*, rather than having flat legal bans. The concept in environmental law of flat legal bans is called

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<sup>52</sup> Walter Williams, *Covert Taxes and Your Right to Know*, WASH. TIMES, Nov. 3, 1996 (arguing that "if workers are better informed about government costs, they might make different political choices.").

aspirational lawmaking,<sup>53</sup> like the Clean Water Act of 1972,<sup>54</sup> which was very similar to Gramm-Rudman or the budget act; you simply declare legally that we're going to get rid of something and then you can all go home and feel good. That doesn't work, for a whole variety of reasons.

What you've got to do is affect the incentive structure of the decision makers. In this instance, the decision maker is not "Congress," not a collective construct, but individual members of Congress. We need to be designing measures that go to the incentives that affect members of Congress.

I've got a couple of quick suggestions.

The first is one that I mentioned in an article on this topic that I published in the *Duke Law Journal* in 1985 called "Constitutional Conventions and the Deficit."<sup>55</sup> I support a lot of these measures, but my own particular pet measure is to move the national elections to April 16th. If we voted the day after we paid our federal taxes, it would actually do more to change the dynamic on the real issue than a lot of the more conventional "serious" measures we are discussing. This gets at the incentive structure, which is really causing the problem.

Another more familiar approach is: Let's put members of Congress on a profit-sharing plan. Throughout industry, people are given targets, and if they meet their targets, they get bonuses. What's wrong with the idea of passing a statute that would give members of Congress a twenty-five or fifty percent bonus in salary if Congress meets its spending targets—this is peanuts in the scheme of things. We could pay them each a million dollars in additional compensation if the Congress as a whole met these targets.

Again what that illustrates is, if you want to regulate effectively, stop talking about legal bans that will constrain Congress as a whole; start talking about the incentives for behavior by individual members of Congress—again, a lesson from the environmental area.

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<sup>53</sup> See Daved Schoenbrod, *Goal Statutes or Rule Statutes: The Cost of the Clean Air Act*, 30 U.C.L.A. L. REV. 210 (1983); see also Richard Lazarus, *The Tragedy of Distrust*, 54 LAW & CONTEMP. PROBS. 311 (1991).

<sup>54</sup> Federal Water Pollution Control Act, 33 U.S.C. § 1251 (1994).

<sup>55</sup> 1985 DUKE L.J. 1077.

The last point is that one of the things that we've learned is that a very effective technique for achieving a change in behavior is to *threaten people with something that they perceive as even worse* than what you want them to do.<sup>56</sup> In the environmental area, we generally call this a "hammer."<sup>57</sup> When I studied the history of citizens' movements for constitutional conventions, I discovered that we'd very rarely had constitutional conventions, but the reason that we hadn't had them very often is, every time a serious public movement got going to call one, Congress would respond preemptively by trying to solve the problem before people got to constitutional conventions.

So, I'm not quite as pessimistic as my comments might have suggested. I believe that if we continue to threaten members of Congress with something that they perceive as even worse in terms of restricting their powers (such as the "balanced budget amendment"), that may, in fact, increase the degree to which they behave responsibly. Threatening with something worse is a well-recognized form of regulation.

Thanks very much.

MR. GRIFFITH: I want to thank our panelists. We have enough time now for some questions. What I would propose to do is that, if you will raise your hand, I will recognize you, and then if you will direct your question to a specific panel member.

AUDIENCE MEMBER: For Representative McIntosh: one way I think that Congress might impose some discipline on itself through affecting the incentives of the decision makers is by making the laws that it imposes on everybody else apply to itself, which, of course, was the point of the Congressional Accountability Act. I read in this morning's *Washington Times* that the Republican-led Congress is seeking court relief from that very law in the context of the attempt to unionize the Capital Police.<sup>58</sup> I was wondering if you might comment on whether that's an

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<sup>56</sup> See generally E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. L. ECON. & ORG. 313 (1985) (describing a "politicians dilemma" in which actors coalesce on their second-best preferences when threatened with a worse outcome).

<sup>57</sup> See Richard Fortuna, *RCRA: The Birth of the Hammer*, 7 ENVTL. F. 18 (Sept./Oct. 1990).

<sup>58</sup> Brian Bloomquist, *GOP Leaders Plan to Stall Part of 'Contract,' Capitol Police Seek Right to Unionize*, WASH. TIMES, Nov. 15, 1996, at A1.

example of somebody looking too much at the one very specific issue and not looking at the big picture.

REPRESENTATIVE McINTOSH: Let me comment on that and share with you an insight on the problem there.

The problem that you mention of the Congressional Accountability Act is one of, I think, a generational shift that is occurring in the country, because we applied all the labor laws to Congress, one of which would, if interpreted the way it is on business, allow clerical employees in Congress to be able to unionize, and the problem that Members have with that is, if they've got a clerical employee who is in their office who also ends up doing policy work for them, they would have an ability to be able to control that person as they're giving them information on how to vote on issues and what their constituents think about different bills.

The solution that some of the older generation came up with was, let's go back and exempt ourselves from that particular provision in law. We had a debate on that, and the newer Members—and I don't want to say just the freshmen, because it was people in the classes ahead of us who had been recently elected—all said, "You don't understand; the purpose of the Congressional Accountability Act is to force us to live under these laws and, if they aren't working, go back and change them, because there are analogous problems in society that are created by those laws."

The result was that the proposal to give us an exemption was shelved, but I haven't seen the article in the *Washington Times*. I'm sure they are still trying to figure out how to avoid this consequence of that bill, and my answer to that is: go in and look at the labor laws and figure out if you've written them correctly, and I think that's the better solution.

AUDIENCE MEMBER: This is for Congressman Skaggs. While I share your concern about the efficacy of these provisions, if you're truly in favor of fiscal restraint and responsibility, what's the harm in giving them a shot?

REPRESENTATIVE SKAGGS: Well, the harm in giving them a shot is, one, whether or not they are, in fact, workable to accomplish the intended purpose. For example, the balanced budget amendment being the top of the list that is generally recited, there has been no provision made in any of the balanced

budget amendment proposals brought to a vote for its pro-cyclical problem; that is, it would inherently reinforce the economic cycle rather than permit fiscal policy to moderate the economic cycle. I think that is just stupid. But so far, we haven't had anyone clever enough to figure out how you provide workable exceptions for real economic circumstances to deal with that in the context of a balanced budget amendment.

The second problem is much more the one that I was trying to get at in my remarks; that a compliance mentality trying to solve all of this by devising additional rules, has clearly shown itself to be much more likely to induce non-compliance behaviors that reinforce cynicism, mistrust, and the problem that we have in getting good people to serve and make mature judgments, than to solve the problem, and so, I come up short on both good public policy and good jurisprudence in the way I look at these proposals.

AUDIENCE MEMBER: Not that I want to begin a defense of Rule XXI for the House, but Professor Bloch and Congressman Skaggs, you both defended your position by saying that it was somehow counter-majoritarian and that, especially Representative Skaggs, you invoked the idea that somehow a minority, a vocal minority representing a very small percentage of the population could block legislation or things that the public supports unanimously. I mean, doesn't that happen everywhere? In committees, a couple of Senators can block or, as historian James Burns said, thwart the political will of a nearly unanimous public.<sup>59</sup> They already do that now under the House rules. How are these distinct and different from each other? You called the supermajority rule a presentment problem. Well, if it doesn't get out of committee, that's clearly a presentment problem.

REPRESENTATIVE SKAGGS: I think this was more of what Professor Bloch was addressing than I was, but let me take a shot at it, as well, in a sort of broader constitutional history context. The very issue of whether or not there should be supermajorities dealing with fiscal policy was the reason that we had a constitutional convention. The Articles of Confederation imploded on this very problem. We could not function as a new

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<sup>59</sup> See JAMES MACGREGOR BURNS, *COBBLESTONE LEADERSHIP: MAJORITY RULE, MINORITY POWER* 88-89 (1990).

nation in requiring supermajorities to deal with the basic responsibilities of government. I don't think we need to repeat that mistake.

PROFESSOR BLOCH: I just wanted to say I tried not to make an argument that the supermajority rule was un-democratic. I understand, as I think I indicated, that there are many instances in the Constitution where supermajorities are required and where, if anything, our Constitution is designed to offer a lot of occasions for gridlock, and it's a way of protecting our liberty.

My argument against the supermajority rule is simply that it undermines the carefully constructed structures that the Framers adopted in how you enact a law, and I think that, for that reason, it is unconstitutional, but not simply because it doesn't let a majority win.

AUDIENCE MEMBER: I'd like to have Congressman Skaggs take up the response to Mr. Elliott's challenge or analysis of your position, and that is, you essentially called upon increased moral virtue, or civic virtue as an answer, among members of Congress, to the endemic problem of over-spending and over-regulating and over-taxing, and said that liberals traditionally have rejected the notion that common everyday citizens have enough moral virtue or civic understanding to be trusted, without government supervision or regulation, to do what is right.

So, why is it that that which liberals seem to find so wanting in the everyday citizen should be relied upon with members of Congress?

REPRESENTATIVE SKAGGS: Not to try to parse out all of your propositions, but let me just say that my view of the political institutions of the country is that, in part, they are designed to ameliorate and are necessary to ameliorate the unfettered results of pure individualism and unrestrained markets, and so they are inherently a way in which we as a people express non-economic judgments.

To turn that on its head and try to impose on the institution that is supposed to sort out our non-economic judgments the same structure that we have seen fail to moderate and modulate our economic judgments, I think, is contradictory and falls of its own weight.

MR. GRIFFITH: Professor Elliott, did you have a response to that?

PROFESSOR ELLIOTT: Yes. I wanted to respond to that, because I do disagree with that, but I disagree with it as a constitutional lawyer.

I think that Professor Bloch has what is for me a persuasive argument, at least a good argument that, when we are tinkering with things that are explicitly dealt with in the language of the Constitution or the design of the Framers, that we have difficulty doing that constitutionally by ordinary statutes or by rules.

What characterizes the Constitution are its so-called great silences, and we are allowed—and it was part of the Framers' design—in those great silences to generate framework statutes which regulate political interaction at a statutory level. I think the challenge, if the need for regulation of the political process is established, is merely the technical but difficult one of coming up with regulatory structures to regulate the political process that do not run across explicit constitutional structures, because we certainly are allowed to regulate politics through statutes where it does not specifically run across the Framers' design.

MR. GRIFFITH: We have time for one last question.

AUDIENCE MEMBER: A question for Mr. Elliott.

Sir, you said during your remarks that the real issue is the total percentage of national wealth to be allocated by government rather than the private sector. During the last presidential campaign, at the beginning of one of the debates, I think President Clinton said that the difference between him and Senator Dole was that he would raise total federal spending, within, I think, six years, by 20 percent, whereas Mr. Dole would raise it by 16 percent, at which point I turned the channel; I can't tell you what else they said. Isn't the real issue here whether the federal government is to be restricted to performing its original delegated powers and whether a judiciary is going to be active enough to enforce that original allocation?

PROFESSOR ELLIOTT: Well, I would agree with the spirit of the question but not necessarily the specific remedy that is suggested.

I noted that, in David McIntosh's statement, he referred to "spending and regulation" as if the two were a compound noun. I think that's absolutely correct. Sadly, one of the things that we learned in the Nixon administration—and I think it was probably the single most important constitutional decision of the era—is

that we could use regulation as a substitute for spending (so called "off budget spending"); we can allocate huge resources in the private sector without taxing and spending.

So, if you simply look at spending and the deficit, I think you're missing the overall issue of what percentage of national income is going to be allocated by the federal government, and we have to deal with that whole area. But I don't think that using the judiciary to hold the government to its originally delegated powers is, in the long run, the solution,<sup>60</sup> although I must say that, as I get older, I think more seriously about that. So, perhaps, from the questioner's perspective, there's hope for me yet.

MR. GRIFFITH: Thank you. We want to thank our panel very much and thank our audience.

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<sup>60</sup> Cf. Jerry Mashaw, *Pro-Delegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON & ORG. 81 (1985).